Office - Supreme Court, U.S.
FILED
OCT 4 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-64

In the
Supreme Court of the United States
October Term, 1984

WAYNE CRYTS, *et al.*,
Petitioners,

vs.

LOUIS FRENCH, Trustee,
Respondent,

and

THE UNITED STATES OF AMERICA,
Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is there a conflict among the Circuits on the issue of whether all uses of bankruptcy jurisdiction prior to the expiration of the December 24, 1982 Northern Pipeline Construction v. Marathon Pipe Line stay are immune from constitutional attack?

2. Is this case of any continuing importance in view of the 1984 amendments to the bankruptcy laws when those amendments do not address either the contempt power of bankruptcy judges or the proper scope and application of this Court's Marathon ruling both retrospectively and prospectively?

3. May the "clearly erroneous" standard of review of bankruptcy court decisions be considered by this court when it was one of the bases of the decision of the Court of Appeals and the petitioners are threatened with the application of this unconstitutional standard to them?

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ARGUMENT

1. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING THE ISSUE OF THE RETROSPECTIVE APPLICATION OF THIS COURT'S RULING IN *NORTHERN PIPELINE CONSTRUCTION v. MARATHON PIPE LINE CO.*

All have agreed that the application of this Court's holding in Northern Pipeline Construction v. Marathon Pipe Line Co., 458 U.S. 50 (1982) is prospective only. The Eighth Circuit concluded from this that all uses of bankruptcy jurisdiction prior to the expiration of the Marathon stay are valid and immune from constitutional attack. Petitioners argue that if Marathon validated previous uses of bankruptcy jurisdiction, it did so only as to those sorts of uses which fall within the limited Marathon holding. That is, its retrospective effect is

limited to cases which fall within its prospective holding. The Eighth Circuit disagreed. Both the Trustee and the Government have asserted that in this the Eighth Circuit is not in conflict with any other Courts of Appeals (brief of Solicitor General, p. 3; brief of Trustee, pp. 15-19).

A review of the decisions reveals that a conflict does exist.

The Trustee refers to a number of cases which hold that because of its prospective application, Marathon does not affect decisions rendered prior to the expiration of the stay. This is a position with which the petitioners do not disagree and which has recently been adopted by this Court. United States v. Security Industrial Bank, 459 U.S. 70,n. 5 (1982). The Eighth Circuit, on the other hand, concluded that Marathon affects all prior bankruptcy decisions in the drastic way of immunizing them

from constitutional attack.

The Fourth Circuit clearly disagreed when it held, in April of 1983, that the "clearly erroneous" standard of review of the decisions of bankruptcy referees established by Bankruptcy Rule 810 violates Article III of the Constitution. 1616 Reminc Limited Partnership v. Atchison & Keller Co., 704 F.2d 1313 (4th Cir., 1983). Both bankruptcy referees under the 1898 Act and bankruptcy judges under the 1978 Act are Article I tribunals. The Marathon reasoning applies to both. If all prior uses of bankruptcy jurisdiction are immune from challenges based on Article III, as the Eighth Circuit held, the Court of Appeals could not have ruled as it did in 1616 Reminc.

The only case to consider the present issue directly is In re Dartmouth House Nursing Home, Inc., 30 B.R. 56 (Bankr., 1st Cir., 1984).

The Appellate Panel correctly concluded that the retroactive application of Marathon is limited to its prospective holding and went on to consider the constitutionality of bankruptcy appeals under a statute said to be unaffected by Marathon: 28 U.S.C. § 1481. This decision was vacated on appeal, but on grounds unrelated to the present case. Com. of Mass. v. Dartmouth House Nursing Home, 726 F.2d 26 (1st Cir., 1984).

2. THE CORRECT RESOLUTION OF THIS CASE HAS GREAT CONTINUING IMPORTANCE BOTH TO THE LAW OF CONTEMPT IN BANKRUPTCY PROCEEDINGS AND TO THE QUESTION OF THE PROPER APPLICATION OF THIS COURT'S *NORTHERN PIPELINE v. MARATHON PIPE LINE* HOLDING TO CASES ARISING BOTH BEFORE AND AFTER THAT DECISION.

Both the Trustee and the Government assert that the present case is of little continuing

importance since the passage, after the Petition for Certiorari was filed, of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (P.L. 98-353). The Trustee goes so far as to assure us that this law will put to rest all possible challenges to the jurisdiction of bankruptcy judges, at least so far as contempt is concerned (Trustee's brief, p. 22). This it will certainly not do.

The 1984 law does not address the contempt power of bankruptcy judges at all. Under it, bankruptcy judges clearly remain Article I tribunals.[1] It is unclear whether contempt would be considered a "core proceeding" which could be heard and determined by

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[1] See: 28 U.S.C. § 151 (designation of bankruptcy judges); § 152(a) and (b) (appointment of bankruptcy judges to limited terms of office by the Courts of Appeals); § 152(e) (removal of bankruptcy judges for incompetence, misconduct, neglect of duty, etc.); and § 153 (salaries of bankruptcy judges under the Federal Salary Act).

bankruptcy judges under 28 U.S.C. § 157(b), or a "related" non-core proceeding as to which a bankruptcy judge could only propose findings and conclusions to the district judge as provided for in § 157(c). The Government's brief suggests that contempt is neither of these but is a power inherent in the nature of a bankruptcy court as a judicial body (Solicitor General's brief, pp. 5-6).[2]

In addition, the new Bankruptcy Rule 9020 provides for criminal contempt power in bankruptcy courts far beyond that which existed under Rule 920 or any previous law. Thus, the issue of the contempt power of bankruptcy judges is still very much with us and is, if anything, rendered more difficult by the 1984 bankruptcy laws.

Petitioners have already argued

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[2] This argument was considered at great length and rejected by the District Court below (see: Pet. App. A-30-47).

that the law regarding the retrospective application of this Court's Marathon decision is inextricably tied to the law defining the proper prospective application of that case, and that both are in a state of confusion. (Pet. App. pp. 15-21). As challenges to the constitutionality of certain actions by bankruptcy judges emerge, as certainly they will, guidance will be needed to help lower federal courts apply the Marathon case or its principles properly. This case presents to the court an opportunity to provide that guidance.

3. THE CONSTITUTIONALITY OF THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW OF BANKRUPTCY COURT DECISIONS IS PROPERLY RAISED AND PROPERLY AT ISSUE IN THIS CASE.

The Petitioners argue that the "clearly erroneous" standard of review of bankruptcy court decisions mandated by the Court of Appeals (Pet. App. A-13) violates Article III of the

Constitution by granting too much deference to the conclusions of an Article I judge. The Eighth Circuit is squarely in conflict, on this issue, with the decision of the Fourth Circuit in 1616 Reminc Ltd. Partnership v. Atchison & Keller, *supra*.

The Trustee and the Government have chosen different lines of attack. The Trustee argues that this issue may not be considered since it was "raised for the first time in the petition presently before this Court" (brief, p. 21). The Government believes that this contention is "manifestly premature since the standard has not yet been applied, and ... petitioners may have no interest in complaining about its application" (brief, p. 6, n. 5).

Concerning the Trustee's argument, this challenge to the standard of review was actually first made in a December 3, 1982 letter brief to the District Court. Since the District Court did not consider it necessary

to rule on this issue,[3] petitioners did not raise it in the Trustee's appeal to the Eighth Circuit. However, since this issue is raised in the decision appealed from, it may properly be considered by this Court. (See: Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 37 (1976)).

Concerning the Government's argument if the standard being applied, is unconstitutional, petitioners have a right to complain of its application to them, regardless of the outcome of that application. The application of an unconstitutional procedure has often been invalidated without regard for the end result of that application. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979).

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[3]The District Court vacated the ruling of the bankruptcy judge and there was, therefore, nothing to appeal.

For the above reasons, it is respectfully requested that the Writ of Certiorari be granted.

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